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No. 85-1647

IN THE
SUPREME COURT OF THE UNITED STATES
APRIL TERM, 1986

HOWARD M. RUBINSTEIN,
PETITIONER

V.

THE STATE BAR OF TEXAS,
RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TEXAS

BRIEF FOR RESPONDENT IN OPPOSITION TO WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondent has included this statement because Petitioners' statement is argumentative, conclusory and deficient by omission. Moreover, Petitioner now mentions his version of matters which were not litigated below and are not part of the record.

This case began with proceedings before the State Bar of Texas Grievance Committee No. 4-B. When the Committee

completed its investigation, it authorized the filing of a formal complaint in the district court by the State Bar of Texas which was done on January 2, 1981. After discovery, which included the taking of Petitioner's deposition, the case was set for trial on July 18, 1983. On the date that trial was scheduled, Petitioner's counsel filed a motion for leave to withdraw as counsel citing irreconcilable differences between him and his client. Mr. Rubinstein approved the motion. After the court denied it, Petitioner discharged his attorney.

Petitioner also filed a motion for continuance on July 18, 1983. Various reasons were urged as additional grounds for the continuance. The court denied the motion. Following Petitioner's discharge of his attorney on July 18, 1983, Petitioner was granted a thirty-day extension of time.

Mr. Rubinstein then filed a motion to file motions pro se, alleging the need to do extensive discovery and pleading before trial, and sent interrogatories to the Respondent. The court held a hearing on these matters and various discovery problems on August 3, 1983, at which Petitioner appeared on his own behalf. The court denied Petitioner's motion to file motions pro se to the extent that any motion might or would interfere with the trial setting of August 18, 1983. Petitioner then filed a pleading challenging the sufficiency of Respondent's complaint on August 8, 1983, and an amended plea in abatement on August 9, 1984. Petitioner failed to schedule a hearing on either the special exceptions or the plea in abatement, and Petitioner did not obtain the relief requested.

On August 15, 1983, Petitioner filed an application for injunctive relief to

stay the trial and enjoin enforcement of the State Bar Act. The essence of his argument was that he was denied an administrative hearing on one of the complaints of commingling in violation of his right to due process. Petitioner also filed a complaint to enjoin the enforcement of the State Bar Act in federal district court on August 12, 1983. The courts did not grant the restraining order. On August 15, 1983, Petitioner filed a motion for continuance alleging that he had employed a new attorney approximately two weeks prior to the date of filing the motion. He did not obtain a favorable ruling on this motion.

It is not clear exactly what happened with this "new attorney," but on the day of trial, Mr. Rubinstein filed a motion to withdraw as attorney pro se. The motion alleges that Mr. Rubinstein could not effectively represent himself

due to inability to be objective and to prepare the case due to his "emotional frame of mind." On the same date, Mr. Rubinstein filed another motion for a continuance alleging that the two attorneys of his choice had conflicts in their dockets. The court did not continue the case on the basis of either of these motions.

The court began the trial on August 23, 1983, and the parties selected the jury. On August 24, 1983, Petitioner failed to appear. The court noted that a lawyer who disclaimed representation of the Petitioner called the Clerk to say that Mr. Rubinstein was in the hospital. Judge Tunks told the Clerk to call the lawyer and say that the trial would take place and that he could relay that message to the Petitioner if he wished. The Clerk also delivered this message to a nurse at the hospital.

Mr. Rubinstein's final motion for continuance was filed on August 25, 1983. In it he represented that he was mentally or emotionally unfit to assist his counsel or act as his own counsel and asked for a continuance "until his treating doctors release him and say he is capacitated or in condition to conduct or to assist his counsel in his trial." Attached to the motion is a letter from Jay Alan Davis, M.D. In his letter, Dr. Davis relates that the Petitioner is a patient under his care at the Methodist Hospital. The doctor then states, "Due to his present medical condition, I request the court to relieve him from any participation in the trial before the court at the present time." The letter contains no description of Mr. Rubinstein's condition nor does it state that Petitioner was unable to attend trial. The court overruled the motion

and the State Bar proceeded to trial without the Petitioner.

Mr. Rubinstein made the court's refusal to grant his August 25, 1983, request for continuance a basis for his motion for new trial. At the hearing on the motion he stated that he could not remember how he arrived at the hospital. Mr. Rubinstein did not supply the trial court with any evidence of his condition from a medical professional but made the self-serving statement that he was not allowed to leave the hospital at the time of trial. The court overruled his motion for new trial.

On appeal to the Tenth Court of Appeals and then to the Supreme Court of Texas, Petitioner argued that his motions for continuance should have been granted. He also complained about the admissibility of evidence and about the measure of discipline imposed upon him.

In none of the Texas courts did Mr. Rubinstein do any more to articulate any Constitutional issues regarding the denial of his motions for continuance than he does in his brief in this Court. He simply mentioned the In Re Ruffalo, 390 U.S. 550 (1968) description of attorney disciplinary proceedings as quasi-criminal in nature and argued that application of the Texas Rules of Civil Procedure to his requests for continuance was unfair. The Courts did not address his argument beyond a statement that in Texas, the civil rules govern this question.

The Texas appellate courts upheld the judgment.

STATEMENT OF THE ARGUMENT

Petitioner did not adequately present the Constitutional issues to the state courts. Petitioner's brief is too vague to inform the Court or Respondent of the exact nature of his complaints

about the procedures employed in Texas in attorney discipline cases. The Texas system adequately protects the rights of attorneys who are accused of misconduct and did not deny Petitioner procedural due process. Even in criminal cases, to which Petitioner seeks to compare attorney discipline cases, courts are not required to yield to dilatory tactics of defendants.

ARGUMENT

It is difficult to respond to Petitioner's brief because his statements that he was deprived of procedural due process and of effective assistance of counsel are too general. He fails to identify the particular actions of the courts below which violated his due process rights. He also fails to attach a copy of the opinion by the Texas Court of Appeals. Therefore, pursuant to United

States Sup. Ct. Rule 21.5, this Court should deny his Petition for Certiorari.

Because Mr. Rubinstein was equally vague and deficient in his description of the Constitutional issues to the Texas courts, this Court should find that the state courts were not given a clear opportunity to adjudicate the Constitutional issues which Petitioner now asks this Court to resolve. Therefore, the court should find that it lacks jurisdiction and deny the Petition of Certiorari.

In Texas, attorneys who are accused of misconduct are given notice and opportunity to respond to chages against them by the grievance committees who are investigating the charges. Rules Governing the State Bar of Texas reprinted in 1A Tex.Rev.Civ.Stat.Ann. Title 14 App. art. 10 §10 (Vernon Supp. 1986). Only if the grievance committee finds just cause

to believe that misconduct has occurred is there a lawsuit filed in district court. The district court proceeding is a trial de novo in which the State Bar must prove each allegation to an impartial fact-finder. Defendants are entitled to full discovery privileges and jury trials. They may complain about the sufficiency of pleadings, obtain the names of witnesses and take their depositions. The district court proceedings are governed by the Texas Rules of Civil Procedure.

From the outset of the disciplinary proceedings, Texas attorneys have the right to representation by counsel. Mr. Rubinstein did retain counsel who represented him during the two years the case was pending in the district court. The court observed that Petitioner's counsel was "about as good a counsel as you could have gotten" and that "he knows his stuff

backwards and forwards." Yet, Mr. Rubinstein fired this attorney on the date that the trial was originally scheduled. The court rescheduled the trial so that he had more than a month to retain another lawyer. Petitioner failed to employ new counsel. Clearly, any court would be justified in concluding that Petitioner waived his right to be represented by counsel. This conclusion would be the same whether the proceedings were viewed as civil, quasi-criminal or criminal. Thus, Petitioner is incorrect in arguing that the quasi-criminal nature of the proceedings and the Sixth Amendment would compel a different result. Petitioner's lack of representation at trial was not atrributable to Texas procedures or to any other participant in the trial, but was Petitioner's own fault.

Petitioner also complains that the trial was allowed to continue although he was not present. Again, his complaint is so vague that it is difficult to answer. His reference to the quasi-criminal nature of attorney disciplinary cases conveys the impression that criminal trials cannot take place in the absence of the defendant regardless of the reason for the defendant's absence. Petitioner also conveys the impression that Texas procedural rules permit trials to take place in disciplinary cases although accused attorneys have good reason for being absent. Neither of these impressions is correct.

If Petitioner had been too ill to attend trial as he contended, he would have been entitled to a continuance under the rules which govern Texas civil cases. See Tex. R. Civ. P. 251 and 252. On the other hand, if Petitioner's illness was

not legitimate, the case could have continued even under the rules applicable to criminal cases. See Fed. R. Crim. P. 43; Tex. Code Crim. P. Art. 33.03 (Vernon Supp. 1986).

Of course, Respondent does not acknowledge that attorney disciplinary cases should be treated as criminal proceedings. If they were, the remedies available to the court and the State Bar would be altered as well as he rights of defendants. For instance, courts may require that criminal defendants post bonds to guarantee their appearance and may issue arrest warrants to obtain their presence at trial.

The case of In Re Ruffalo, 390 U.S. 550 (1968) on which Petitioner relies so heavily concerned a situation in which an attorney was disciplined for misconduct but was given no notice of the charge. In that case, the Court observed that

attorney disciplinary proceedings are quasi-criminal in nature. The Court did not elaborate on this statement and also concluded that the lack of notice would have constituted a due process violation in a civil or criminal proceeding.

Even the most expansive interpretation of Ruffalo does not establish that procedures employed in criminal trials be applied to attorney disciplinary proceedings. There is no reason for the Court to hold as much now because attorney disciplinary cases are not penal in nature.

Clearly, the precedential value of Ruffalo lies in the general concept of due process: that attorneys who are accused of misconduct should be given notice of the charges and an opportunity to respond to them at a meaningful time and in a meaningful manner. The Texas system gives attorneys the opportunity to do that twice before discipline is im-

posed. Mr. Rubinstein waived his rights and may not now complain that he was deprived of them.

CONCLUSION

Petitioner's failure to express the points requiring consideration with clarity in this Court justifies denial of his Petition for Certiorari. Petitioner failed to make a sufficient presentation of the Constitutional issues to the Texas courts to warrant consideration by this Court. There is no serious question regarding the constitutionality of Texas procedures in attorney disciplinary cases.

Respectfully submitted,

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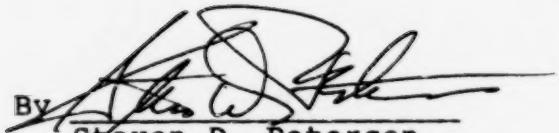
By 
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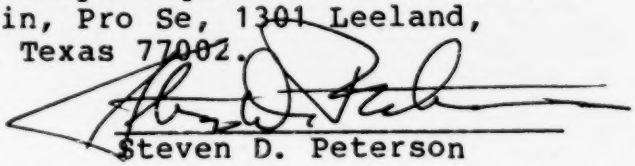
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Steven D. Peterson, counsel of record for Respondent, State Bar of Texas, do hereby certify that on this the 6th day of MAY, 1986, three (3) copies of the above and foregoing Brief for Respondent In Opposition to Writ of Certiorari was served by certified mail, return receipt requested on Howard M. Rubinstein, Pro Se, 1301 Leeland, Houston, Texas 77002.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